STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CONSUMERS POWER COMPANY, a Michigan corporation, and THE DETROIT EDISON COMPANY, a Michigan Corporation, Plaintiffs, -vs- FRANK J. KELLEY, ATTORNEY GENERAL, RICHARD H. AUSTIN, SECRETARY OF STATE, and BOARD OF STATE CANVASSERS, Defendants.	File No. 86-56487-CZ Oral Argument

Proceedings had in the above-entitled matter before the HONORABLE ROBERT HOLMES BELL, Circuit Judge, at Mason, Michigan, on July 18, 1986, A.D.

PRESENT:

JOHN D. PIRICH
and
MICHAEL J. HODGE, Attorneys for Plaintiffs

GARY P. GORDON
and
TODD B. ADAMS, Assistant Attorneys General
Attorneys for Defendants

Kevin W. Gaugier
Official Court Reporter
CSR-3065

Mason, Michigan

July 18, 1986

P R O C E E D I N G S

THE COURT: Okay. In the matter of Consumers Power Company, et al, versus the Attorney General, et al. This carries the Court's Docket No. 86-56487-CZ. Mr. Pirich and Mr. Hodge are here representing the Plaintiffs. Mr. Gary Gordon and Mr. Adams, I believe it is, are representing the Defendants in this matter.

The Court has had the benefit of a very well-written amicus curiae brief by the Michigan Citizens Lobby in this matter.

I think this much should remain clear, gentlemen. This matter has come on rather quickly, and I say this not by way of apology, but by way of explanation. This Court has given this matter rather intense treatment, but for a very short period of time. Your briefs have been very instructive, and it's my understanding, due to the time frames that are involved in this matter, that really time is of the essence in terms of the adjudication of this particular matter. So, therefore, this Court has studied this particular unique, and, I might suggest, rather difficult issue with the thought in

mind that a resolution should be had as soon as possible, and obviously one of you will go on to the next bus stop in the higher courts.

Mr. Hodge, are you ready to proceed -- Mr. Pirich, you may proceed.

MR. PIRICH: Your Honor, if I may, I'd like to approach the bench and indicate to the Court that a stipulation of facts was agreed to by the parties, and also Mr. Gordon provided us with an errata sheet earlier today, and so the Court has the advantage of having that at the beginning of argument. He's asked me to present it to you.

MR. GORDON: That's correct, Your Honor.

Your Honor, the errata has no bearing or change on any position we had in this case. There were a couple of misstatements that are not of significance to this particular proceeding, but may be down the road.

THE COURT: More clerical than anything else?

MR. GORDON: Primarily, yes, Your Honor.

THE COURT: By way of stipulation of facts, this Court may accept these in lieu of testimony having been taken on these specific issues; is that correct?

MR. PIRICH: That is our understanding.

THE COURT: And would treat them just as though

it had made these findings of fact on its own?

MR. GORDON: That's correct, Your Honor.

THE COURT: All right. Okay.

You may proceed, Mr. Pirich.

MR. PIRICH: Your Honor, first of all, I note the time. I would like to inquire of the Court if we have the one-hour limit that I understand was initially imposed, or are we operating on some other schedule than that?

THE COURT: Oh, did we have a one-hour time limit?

MR. PIRICH: That's what I was advised we had a one-hour limit.

THE COURT: Oh, okay. Well, there is, generally speaking, virtue in brevity. But I'll leave it to your discretion.

MR. PIRICH: I understand that. I just don't want to violate any agreement I entered into.

THE COURT: Go ahead.

MR. PIRICH: Your Honor, I know I speak for Mr. Gordon and Mr. Adams, and I speak to you in addressing these issues in the expedited manner which this Court has indicated it has engaged in to date. It's fair to say that these are rather complicated factual and legal matters which we believe will be limited significantly because of these agreements that

were worked out and because of the time frame in which the briefs were submitted.

Your Honor, if I can, I'd like to first give a very brief recitation of how we got here, because I think it's important in terms of the defense raised by the Attorney General and in the amicus brief in terms of the issue of laches.

First of all, as the Court is well aware, this case was filed in June of this year, and the Complaint seeks a declaratory judgment regarding Section 472 of the Election Law, State of Michigan 1954 PA 116, Section 472(a), which was enacted in 1973, which imposed a standard in terms of petition signatures that were circulated relevant to either initiating legislation under the provisions of the 1963 Constitution -- namely, Article 2, Section 9 -- or to initiate constitutional amendments under Article 12, Section 2.

After that particular statute was enacted the Attorney General in 1974, specifically August 13th, issued an opinion in response to an inquiry regarding Article 2, Section 9, and declared that Article 2, Section 9, was self-executing, and cited the provisions and the findings and teachings of both the Court of Appeals and the Supreme Court in Wolverine vs. Secretary of State, which is cited at 384 Mich 461 in the Supreme Court, and is cited at 24 Mich App 711 in the Court of

Appeals. The Attorney General was constrained to conclude that Article 2, Section 9, was self-executing; and, therefore, the attempt to regulate the submission of petitions to initiate legislation, which by statute had to occur 10 days prior to the beginning -- or no later than 10 days prior to the beginning of a legislative sessions was unconstitutional.

The Attorney General then took the teachings of the Wolverine decision in regard to Article 2, Section 9, and said, well, since Article 2, Section 9, is similar in that Article 2, Section 9, is an indirect form of direct participatory government and Article 12, Section 2, is a direct form to initiate amendments to the Constitution, he was constrained to declare the provisions of Section 724(a) that are here unconstitutional, and we have provided a copy of the Attorney General's opinion to both the Complaint and to the motion for summary disposition.

Well, what happened then? Well, what happened was that, in 1982, a ballot proposal came about which affected the utilities, and this Court is probably well aware was subjected to litigation because two proposals were on the ballot basically affecting the same issue, Proposal D and Proposal H, and in one of those unbelievable quirks of Michigan politics, both of them received more affirmative votes than negative

votes and the utilities filed a lawsuit attempting to have the issue of which took precedent in the Michigan Circuit Court in Ingham County. That decision was ultimately expedited to the Supreme Court, and in January -- strike that -- in the spring of 1983 Michigan Supreme Court decided that Proposal H had received more of affirmative votes than Proposal D, and, under the provisions of Article 12, Section 2, it would take effect.

Subsequent to that decision the so-called Michigan Citizens Lobby, a group which has engaged in petition drives in the past for either initiation of legislation or amendments to the Constituion, announced that it was going to seek another initiative drive to amend the Constitution. I give you that portrait background because it's important to the laches issue.

We have secured one of the initial petitions, which was approved by the State Board of Canvassers on September 30, 1983.

THE COURT: Wait a minute. Are you going to argue laches?

MR. GORDON: Yes, Your Honor, I am.

THE COURT: I don't find laches. Let's go by that quickly. I don't find laches. I think there's a real case in controversy here. I believe the argument can be made.

Your objection is preserved, but let's cut through it. I think there's an actual case in controversy put before the Court in 1986, and that's what we've got here. I can't go back and find that that laches applies. There is a place for laches, no question about it, but it's not, this Court believes, an applicable defense to this kind of an action under this kind of a constitutional challenge.

Go ahead to your next argument.

MR. PIRICH: Thank you, Your Honor.

Having disposed of that issue, then we'll turn to what is the crux of the issue before the Court, and that is whether or not Section 472(a), which attempted to impose a procedure which said that signatures which were affixed to petitions and which in fact were in excess of 180 days old or in excess of 180 days prior to the filing of the petitions were stale and void.

Now, first, Your Honor, we would refer the Court to Article 12, Section 2. Article 12, Section 2, is a companion of Article 17, Sections 2 and 3, from the 1908 Constitution and, as the Court is well aware, the appellate courts in this state have invited both the trial courts and the appellate courts to look to the history of the Constitution, to look to the debates themselves which have been published,

and also to look to the convention comments. The convention comments in regard to Article 12, Section 2, address what we consider to be one of the real cruxes of this issue.

The Attorney General in his opinion said Article 12, Section 2, is self-executing. Therefore, legislative implementations of any kind are improper and, therefore, Section 472(a) is unconstitutional. Well, first, in the provisions of Article 12, Section 2, the convention comments, Point No. 3, which is referred to in MCLA on Page 637, Article 6 to the end, which is the third volume of MCLA, the convention comment reads as follows:

> "Details as to form of petitions, their circulation, and other election procedures are left to the determination of the Legislature."

Now, that comes right out of the convention comments, and, in fact, Your Honor, if you read Article 2 of Section 12, in the first three paragraphs it refers specifically to this requirement to impose standards, procedures, and other forms of indication and notice to parties by law. It doesn't do it here as it did in the predecessor.

Now, the predecessor provision, Article 17, Section 2, was subject, fortunately for the Court's benefit,

to litigation in Hamilton vs. Secretary of State, 221 Mich 511, a 1921 decision, and that is referred to extensively in the Attorney General's opinion, and it's also referred to extensively in the Attorney General's brief.

THE COURT: I've got two Hamilton decisions. One is a 1923, and one's a 1924. You're referring to a 1921?

MR. PIRICH: Excuse me, Your Honor, '23. It's a 1923 decision.

THE COURT: Which one?

MR. PIRICH: Hamilton I.

THE COURT: Hamilton I?

MR. PIRCH: Hamilton I is a decision which is basically the case which is cited by both the Attorney General's opinion in 1974 and in the briefs which were submitted by the Attorney General in this case.

Go backwards in history for a moment, if you will. Article 17, Section 2, regarding this initiative procedure had what one would -- one of the courts referred to as a road map for the procedures for calling upon the citizenry in terms of what procedures had to be followed. It was very detailed, very specific, and it was very long. Basically, with the recodification of the Constitution in 1961 and 1962, there was an attempt to simplify that procedure because one of the

problems with the 1908 Constitution, both from inception and amendment, was it was becoming a long, verbose, and complicated document; much of which, many argued, was unnecessary. The Hamilton decision came about when there was a challenge to petitions and their timeliness under the former procedure for determining the number of signatures and the period of time within which petitions would be circulated.

Back then we elected a governor every two years, so the basis for determining the number of signatures necessary under the 10 percent requirement changed every two years. Petitions were filed and there was this challenge to the Attorney General, and the Secretary of State said, well, these petitions have been circulated over too long a period of time, and if you look at the Hamilton decision, the Hamilton decision says there is nothing specific in the Constitution that speaks to that issue. The Constitution of 1908 didn't require the Legislature to do anything and, in fact, anything beyond the direct language of the Constitution, the Court concluded was beyond the ambit of a legislature and, therefore, you couldn't impose the standard at that particular point.

Well, from the first Hamilton decision, then, that became the standard. There seemed to be no basis by law by which the Legislature could change this situation because

Article 2 -- Article 17, Section 2, was so specific and so detailed in terms of the requirements that the people initiating or attempting to initiate amendments to the Constitution would have to follow. Leapfrogging from that issue, then, although the Constitution was amended in 1941, it still had this very detailed procedure in it until the new codification in 1963.

In 1963, as I pointed out, the new language came about, and the convention comments do point out that, although this Article 12, Section 2, is a revision, it points out some of the specific procedures which are to be followed in terms of implementing the legislation, in terms of implementing the Constitution, and, as the Court is well aware, when parties circulating petitions to amend the Constitution or circulate petitions to initiate legislation -- and I have a copy of this. If the Court would like, I can approach and give a copy to the Court. There are certain requisite requirements which, by statute, must be met, and I think you either have one in front of you or I can approach the bench and give you one.

But the Legislature, if you will, has basically talked about the procedures, the numbers, what has to be on the petition and things of that nature. You have to indicate it's an initiative petition and you have to have certain type

size and have to have certain warnings. For instance, there's a warning with regard to anyone who knowingly signs the petition more than once or signs a name other than his or her own, signs when not qualified, or sets opposite his signature a date other than the actual date the signature was affixed is violating the provision of the Michigan Election Law. So these are the kinds of implementations which have occurred which have led to a very standardized kind of procedure, have led to a procedure which says this is what you have to do, because if you don't have this kind of standardization, we're not going to have any compliance with the general spirit of the election law or with the Constitutional mandate in Article 2, Section 3, which talks about upholding the purity of the electoral process.

In 1973, after the Michigan Constitution had been recodified and adopted in 1963, in 1973 the Michigan Legislature imposed a standard under Section 472(a) that said petition signatures 180 days old from the filing date going backwards were stale and were presumed to be void.

THE COURT: What's this I see here under my MSA provision that this apparently was an amendment from an earlier statute that talks about 90 days? Is that --

MR. PIRICH: That is correct. As the Attorney

General points out, earlier that same year in 1973, the Michigan Legislature adopted a provision that said the petition signatures would be stale 90 days prior to the filing date. Any signature attained 90 days prior to the filing date would be deemed stale and void. In fact, that provision was then modified later in that same legislative year to 180 days, and that was the standard which was subject to the attack and the constitutional interpretation rendered by the Attorney General. There had not been, prior to that particular time, any legislation speaking to the staleness of initiative petitions.

I will point out to the Court, and I'll point out in argument as we have in our brief, that the Legislature in terms of a sister provision to Article 2, Section 9; namely, Article 2, Section 8, the recall provision, said that petition signatures affixed to recall petitions were not capable of being counted if they were in excess of 90 days old when filed. So we have a standard in the recall section that says any petition 90 days or older cannot be counted. We have a standard in Article 2, Section 9, which said that you had to file 10 days prior to the legislative session, which was struck down, but we have a standard in terms of the remaining issue, the initiative amendments to the Constitution that says 180

days. In other words, under the language of the Constitution and under the statutes now, we know about the constitutional format that you have to file at least 120 days prior to the election if you expect to have the petitions reviewed, challenged, and certified, and then under the 60-day notice period, provided to counter clerks or publication so that they may be on the ballot.

THE COURT: Hence you have your 120 -- or 120 and 60 gives you 180.

MR. PIRICH: So we know exactly what the standard is, looking backwards.

THE COURT: And it's your position that on all of these constitutional provisions, they rest on the "as provided by law" contained in all these constitutional provisions that the Legislature is acting in accordance therewith?

MR. PIRICH: That's correct.

THE COURT: Would your argument be the same today if there was a 90-day provision in there?

MR. PIRICH: I think our argument would be the same if that was the standard the Legislature had adopted.

THE COURT: Would your argument be the same if it was a 30-day provision?

MR. PIRICH: If the Legislature had adopted that.

I think we have to go back to the maxim the statutes are presumed to be constitutional on their face, and I can point out, Your Honor, a very interesting decision which we've cited for the Court, April 7, 1986, Mayor of Highland Park vs. Wayne County Elections Commission. It had to do with a recall challenge which was brought by the mayor of Highland Park, and he challenged this -- he challenged various portions of the Election Code which purportedly implements Article 2, Section 8, and he determined that one of the provisions that implemented Article 2, Section 8, was unconstitutional, and the Court of Appeals said:

> "Although we do not lightly reject the circuit court's thoughtful decision, we conclude it erred in finding Section 952 of the Election Law unconstitutional under Article 2, Section 8. The statutes are presumed to be constitutional."

It cites O'Brien vs. Hazelet, 410 Mich 1, a 1980 decision, and going on, the court said:

> "The presumption of constitutionality may even justify construction of the statute that is rather against a natural interpretation of the language used, if necessary, to sustain the enactment."

Now, in that particular case, in that particular issue before the Court of Appeals, the court said that the language that was challenged was intended to preserve the statutory requirement that a recall petition must clearly state what the reasons for the recall were, and it said in that particular regard:

> "Such a requirement serves to put the public official being recalled on notice of the nature of the conduct he is being recalled for, and it also is consistent with the basic policy of informed decision making."

Now, in this particular case, taking the court's hypothetical, let's say it was 30 days. If there was a basis or a reason for concluding that that was an impossible basis or period of time in which to seek petitions, obviously the court could make that judicial determination. I think the history of the petition process is that 180 days is not impossible to achieve the collection of 304,001 ballot signatures. In fact, it's interesting the Court will note in the briefs that were filed on both sides of this case there was reference in the constitutional debates to set a maximum limit for initiative petitions at 300,000 signatures. Back in 1961 and '62 the total vote for governor had not yet reached

the totals that we're at today, so that requisite number was about 280,000 signatures, and some of the people talked about, well, let's try to fix this figure once and for all so it doesn't keep going up and up and harder to get and harder to achieve and make this process more unavailable to the citizenry.

In point of fact, however, as is pointed out in the brief, the framers of the Constitution indicated that this was not to be an easy process. It was not to serve frivolous campaigns or minority-based positions which, through the passage of time or through a particular point in time, could have some popularity, thereby resulting in these unending amendments to the Constitution if in fact they didn't really garner the support of the substantial percentage of those who voted for governor in the last preceding election.

THE COURT: Then what do I do with the Ferency decision where, on Page 602 of the Ferency decision, the court says:

> "Constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed and their exercise should be facilitated rather than restricted"?

Might we not say that the logic that you're employing is a logic which says that they should be restricted?

Isn't this --

MR. PIRICH: Well, I can understand the Court's inquiry of the Ferency decision because I think it's interesting. I think the Ferency decision has to be looked at in the context of what it involved. Remember, there were two opinions in the Ferency decision.

THE COURT: I mean it's --

MR. PIRICH: It's complicated.

THE COURT: It's apples and oranges compared to what we're talking about here, I agree. But what bothers me, and I suppose one could write it off as dicta, but proceeding with Page 600 through 602, the last part of the majority decision takes a broad stroke look at the Wolverine Golf Club case and a number of them and recites, I presume, a philosophy that the appellate courts in Michigan have, and I guess the problem that I see I'm wrestling with is the constitutional framers' philosophy appears to be at variance from that of the philosophy, for lack of another term, of the Supreme Court, doesn't it?

MR. PIRICH: Well, I think it isn't, Your Honor. I think it isn't because I think Ferency did not concern the procedures which the framers in the constitutional comments talked about. I return to that Provision 3. Details as to

form of petition, to circulation and other election procedures are left to the determination of the Legislature. I understand where Ferency came down -- where the court came down in the two decisions, and I think, when one reads it initially, one can believe, well, there can't be any regulations or restrictions.

But go on, Your Honor, to the case that came after Ferency. In 1982, Citizens for Capital Punishment vs. Secretary of State, which is also a decision of the Michigan Supreme Court also interpreting the same section came down, and I think it's interesting if the Court looks at the decision, and I think the Court has a copy in front of it --

THE COURT: Yes, Page 9.

MR. PIRICH: Exactly. I think it's interesting because in the Citizens for Capital Punishment decision, the court realized that there were certain circumstances and situations where in fact the particular constitutional prescription for legislative aid was not only in fact useful, but it was helpful. On Page 915, the court said:

> "These requirements in essence are authorized by the Constitution itself, which specifically direct that any such petition shall be in the form and shall be signed and circulated in such manner as prescribed by law,"

and then continuing on, Your Honor, and I think this is really important because it puts Ferency in the correct context that I believe and we believe the court intended:

> "In enacting these statutory requirements, the Legislature has followed the dictates of the Constitution, an action which cannot, in this instance, be said to be unconstitutional,"

which in point of fact is exactly what the Attorney General's opinion said. Going on:

> "Furthermore, the requirements of these statutes serve to further the important state interest of insuring the purity of elections."

Now, Your Honor, we've contended that certainly making sure that the signatures affixed to the petitions are registered electors and certainly making sure that there is some basis and some period of time within which that decision is made is a reasonable and a prudent action by the Legislature which will in fact insure the purity of the elections. But, presupposing that the Court would ask this question, and understanding the dilemma that the Court could find itself in in looking at both the Ferency decision of 1980 and the subsequent decision of the Supreme Court in Citizens for Capital Punishment, I think perhaps if one looks at the

position that the Attorney General takes in this case, one ought to look at the position that he took in Citizens for Capital Punishment vs. Secretary of State, and, if I may approach the bench, Your Honor, I'd like to hand a copy of the Attorney General's brief in that decision to the Michigan Supreme Court because I think it's illustrative and helpful.

THE COURT: Thank you.

MR. PIRICH: And if the Court will note, this is a brief of the Attorney General's that was submitted to the Supreme Court in the Citizens for Capital Punishment case on September 3, 1982, and rather than making the Court labor and turn through all of the pages, we've taken the liberty of highlighting what we think are the appropriate references and passages which the Attorney General argued in 1982 clearly indicating why the Legislature not only had to but why it should enact certain provisions to implement Article 2, Section 12.

On Page 5 of that particular brief, they argue to the Michigan Supreme Court that Article 12, Section 2, mandates that the petitions for constitutional amendments shall be in a form and shall be signed and circulated in a manner as prescribed by law. On Page 9 they also refer to the exact constitutional language that we have cited, but, more

importantly, in their own relevant provisions that have been highlighted, perhaps the best answer to the Court's inquiry begins on Page 25 of the brief.

In that particular case the Attorney General's Office was attempting to insure that these provisions implementing Article 12, Section 2, through legislation were upheld, and there the Attorney General took the position that the plaintiffs in that case have cited Ferency in support of their contention that Article 12, Section 2, is self-executing. But there the Attorney General said an actual reading of Ferency discloses the inadequacy of that argument. They state that Ferency dealt primarily with the legislative requirements that petitions for proposed constitutional amendments cite all provisions which would be altered, and then they go on to say that this case has nothing to do with the validity and sufficiency of signatures. That, Your Honor, is what the 180-day requirement has to do with, the validity and the sufficiency and the ability of anyone to challenge those petition signatures in a logical and meaningful framework.

Your Honor, let me give you a hypothetical that perhaps might help the situation a little bit. The provisions of Section 472 don't say that those signatures can't be brought back to life, that they can't be given credibility, that they

can't be counted. But if proponents of ballot proposals are going to take two years or three years, and if you read the errata sheet submitted by Mr. Gordon today, as many as six years could elapse from the initiation of the first signature till the actual election date, we don't think that's what the framers had in mind. We don't think that's what the Supreme Court had in mind when it decided the Hamilton case back in the 1920's; or, more importantly, when it decided the Ferency case in 1980; and, more specifically, when it decided the Citizens Against Capital Punishment in 1982.

I think there is a certain glamour in an appeal to jump on this bandwagon of self-execution, everybody stay away from it. But if we took that self-execution argument literally, then do we need petitions or do we need verifications, or do we need to warn citizens who sign or circulators who sign that they could in fact violate some other law? In point of fact, if you take the Attorney General's position in terms of self-execution, the Legislature can't do anything.

The Legislature, if you take self-execution to its nth degree, can't impose criminal penalties for people who violate provisions of the Election Law, can't in any way require that there be any uniformity in terms of the style of

the petition, the information that's contained on the petition, the certificate of circulator. In other words, you would say, well, it's self-executing, so, therefore, unless the Constitution is amended, you can go out and get people to sign two, three, and four times; you can go out and take as much time as you need, even getting people who have signed honestly once, forgot about it and signed again. It absolutely cuts, Your Honor, the whole concept of the preservation of the purity of the electoral process. In fact, if you took the self-execution argument to the ultimate, the Secretary of State and the Board of Canvassers would have no duties whatsoever when any petitions are filed henceforth under Article 2, Section 9, or under Article 12, Section 2, because, if you take that position, the Constitution's self-executing, it doesn't call for anything, therefore, the matter immediately achieves ballot status, and, Your Honor, we don't believe that's what the framers had in mind. We don't believe that's what the Supreme Court had in mind in its affirmation of Judge Lesinski's majority opinion in Wolverine, and we don't believe that's what the Supreme Court had in mind when it interpreted Ferency in the generic sense of what Ferency said. There's no argument that, generically, there is a procedure and a format for amending the Constitution or initiating legislation, but that

doesn't mean that the Legislature has been proscribed from doing what it has done, and, more importantly, we don't believe that the Attorney General has overcome the burden that's imposed upon him in terms of showing the unconstitutionality of this statute, especially after the Citizens decision and especially after their argument that Article 12, Section 2, has to be aided and assisted by the Legislature.

In terms, Your Honor, of the remaining arguments that are contained in our brief, we think it's been clearly shown from a review of the history of the constitutional debates that Article 12, Section 2, even as the Attorney General's brief indicates, was a bare skeleton for this procedure; that it did require aid and assistance; that it did require the kind of procedure that the Legislature has engaged in, and returning to your earlier comment about the limitation period of time, we think it's interesting if the Court looks at a subsequent Attorney General's opinion that came down after Opinion 4813, and that was issued in 1976, Opinion 4964, which is alluded to in our brief, there and under the provisions of Article 2, Section 8, then State Senator Jack Welborn wanted to know if the 90-day freshness requirements for signatures to recall petitions were valid, especially after the opinion had been issued previously by the Supreme Court, by the Attorney

General's Office declaring unconstitutional Section 472(a) and the 180-day time period. And, remember under the recall provision, if you want to recall the governor you have to attain within 90 days over 750,000 signatures, a substantially different time frame, and the Attorney General in that particular case concluded that, no, the Legislature could implement Article 2, Section 8, because Article 2, Section 8, said laws shall be enacted to provide for the recall of elected officials. Yet when you look at Constitution 1963, Article 12, Section 2, what does it say? It says petitions shall be in the form and shall be signed and circulated in such manner as prescribed by law.

Now, granted, the verbs have changed positions, and, granted, that we have inversed the order of the language, but it calls for exactly the same aid and assistance. It doesn't say that everything is done in this constitutional document. It doesn't say that everything hinges upon every word that's in that section.

So we think that the argument of the self-execution of the provision does not answer the question. We think, also, that we have shown, Your Honor, and we are certain that we have shown clearly that Section 472(a) preserves the purity much as several of the lower courts, and we mentioned

in our brief the Caldwell decision which was rendered prior to the Hamilton decision and the Kiehl and the Yenter decisions, which were talked about in Wolverine, all come up with the concept that self-execution is not a limit unto itself.

Finally, Your Honor, I think it's important to look at the closing paragraph of Judge Lesinski's opinion in Wolverine, which basically was affirmed and adopted by the Supreme Court. Judge Lesinski on Page 738 of that decision said in terms of striking down the 10-day requirement:

> "In so holding we do not intimate that a time limit necessary and reasonable for the effective administration of the initiative process after the Legislature has considered the initiative position might be invalid,"

and that's never been determined by any court in this state, Your Honor.

THE COURT: What's the next sentence state?

MR. PIRICH: I beg your pardon?

THE COURT: What does the next sentence state?

MR. PIRICH: The next sentence states:

> "Such will withstand challenge so long as it does not constitute an unnecessary restraint on the right of initiative."

THE COURT: Isn't that the question?

MR. PIRICH: Well, I think it's a question in a sense generically, if it was something that was unreasonable. If it was 30 days and if in fact it can be shown that there is no way that this can be done, then that might be a reasonable interpretation. But we don't believe that 180 days is unreasonable. It's been done and --

THE COURT: Doesn't this call for a Judge Bell decision as to what Judge Bell thinks is unnecessary in a restraint position?

MR. PIRICH: I think you have to take the position that the Legislature's actions are presumed to be constitutional, and I think you have to take the position that the legislative history and the legislative enactment considered what was a reasonable time frame, what was a reasonable schedule for this procedure to occur.

THE COURT: In other words, that the burden of proof is to show that it is not reasonable?

MR. PIRICH: I think that is a correct interpretation, and, in fact, as we pointed out, as late as this recall decision rendered by the Michigan Court of Appeals, this Court is required under the mandates of Michigan law to find every way and to seek every interpretation that would

uphold this statute not to engage in the kind of questions which could result in an unconstitutional discrimination. We believe that the requirement of the 180-day period, much as the following requirements that were constitutionally mandated, show that there was a need for regulation. There's a need for preservation of the electoral process, and one should not lose sight of that in terms of all of the opinions that have been rendered in regard to this particular proposition.

Your Honor, I would like to reserve a few minutes in rebuttal and would thank the Court for its courtesy in hearing us today. Thank you.

THE COURT: Thank you.

Mr. Gordon?

MR. GORDON: Thank you, Your Honor.

Your Honor, I'd like to make it clear on the record, while I understand you have ruled with regard to the issue of laches, that by not presenting any argument at this time I am not waiving that.

THE COURT: Right. That's understood.

MR. GORDON: All right. Thank you, Your Honor.

THE COURT: It's preserved.

MR. GORDON: First of all, there have been a number of cases cited by Mr. Pirich that address recall, which

is found in Article 2, Section 8, of the Constitution.

Just by way of brief rebuttal of those cases, Your Honor, the first sentence of that section states that laws shall be enacted to provide for recall of all elected officers. There's nothing self-executing about that provision at all. That provision delegates all authority for recall, for enacting laws, procedures and standards and things of that nature to the Legislature. That is inapposite to Article 12, Section 2, which specifically lays out in great detail the large part of the procedure to be utilized in amending the Constitution and allows the Legislature to provide forms and method for circulation of petitions.

Now, that was what was addressed in Citizens Against Capital Punishment. The attack there was basically on any legislative regulation or implementation of this section whatsoever. We aren't talking about that here. We aren't talking about the Legislature implementing this section, putting it into effect, taking what the people have set out in Article 12, Section 2, and using that or setting up a method for its use. The Legislature here is restricting its use by 427(a).

THE COURT: Let's just look at that Section 2; Article 12, Section 2:

"The person authorized by law to receive such

petition" -- we know who that person is -- "shall, upon its receipt, determine as provided by law the validity and sufficiency of the signatures on the petition."

MR. GORDON: That's correct, Your Honor.

THE COURT: It goes on. Well, is not the ascertainment of the validity of the signatures, then, part of that which this person, the Secretary of State, is vested with the responsibility of determining?

MR. GORDON: That's right.

THE COURT: And must not that determination be made based upon a statutory criteria? Otherwise, it would be arbitrary, wouldn't it?

MR. GORDON: That's correct, Your Honor. However --

THE COURT: And might not part of that statutory criteria be, as is argued here, a window period of 180 days within which the matter should be accomplished?

MR. GORDON: I would argue not, Your Honor.

THE COURT: Well, but doesn't that go to the validity and sufficiency of the signatures?

MR. GORDON: The validity and sufficiency of the signatures, Your Honor, concern the number of signatures that have been filed. That's the number set forth by the

constitutional provision also, and whether the signatures are those of registered voters and whether they were circulated in the appropriate manner on the forms provided by the Legislature. That's what we would submit that that refers to.

Your Honor, just examining the law in this area, there's certain facts -- there's certain law that isn't contested, I don't think even by Mr. Pirich. One is that -- and there clearly are principles that we have to apply to the analysis of this. One is that Article 12, Section 2, has been referred to by the Michigan Supreme Court as self-executing. That's in Ferency. There's no doubt. The court stated on Page 590, 591 of that case, 409 Mich, I quote:

"This section is self-executing -- it does not depend upon statutory implementation."

THE COURT: Well, wait a minute. There's a footnote:

"While some of the legislation-like procedural detail was eliminated in the 1963 Constitution, much was retained with the express purpose of preserving the self-executing character."

MR. GORDON: That's correct, Your Honor.

THE COURT: Right.

MR. GORDON: The provisions of the Constitution

in existence now that provide for legislative implementation, we think, can be traced to those provisions of the 1908 Constitution, those details that were dropped. Those provisions of the 1908 Constitution that have stayed, which include the circulation period, are not subject to legislative implementation. That is what that language, we would submit, refers to, the details whether an individual has to be a registered voter, when, and what the size of the petition is to look like.

THE COURT: When? What do you mean by "when"?

MR. GORDON: When, they have to be a registered voter. The size of the petition, what governmental jurisdiction the petition may be circulated in. Those are the types of detail that have been left for the Legislature to implement. Those were included or there's a lot of detail in the 1908 Constitution. Part of that has been dropped. Part of the 1908 Constitution that referred to the circulation, the basis for determining the number of signatures required, has not been dropped. That portion of the -- well, may I continue with some of the law in this area so far?

You pointed out earlier that when a provision of the Constitution is self-executing, we know the Court views this provision self-executing, the Legislature may not limit

or restrict rights granted by the provision. That's set out in Wolverine Golf Club. That's set out in the Ferency case, the --

THE COURT: But, you know, if the Legislature provides a law which talks about the sufficiency of the signatures and the nature and the manner of the collection of the signatures, they have in fact, be it legitimate or not, inhibited the procedure, the petitioning process to some extent, haven't they?

MR. GORDON: I think they have implemented a provision. They are setting up standards to be followed, placing people on notice, setting standards. That type of procedure will prohibit a filing official from acting arbitrarily and rejecting signatures.

The Legislature has said these signatures on this type of petition form, if these rules are followed, are acceptable. That limits the authority of any filing official to reject those. So, to a certain extent, that doesn't restrict; that implements and assists the people in amending the Constitution.

THE COURT: But it makes it a little harder to get the petition, to get the signatures, doesn't it?

MR. GORDON: I would think not, Your Honor.

THE COURT: As opposed to providing --

MR. GORDON: By providing forms, I don't think that would make it harder by saying that you're required to circulate only in a county, for example; you're required to indicate your home address and your post office address. I don't think that that makes obtaining signatures more difficult.

THE COURT: I mean it would be harder than writing them on the back of paper bags. I think we would agree with that; right?

MR. GORDON: I think that's arguable, Your Honor.

THE COURT: Oh, okay.

MR. GORDON: I wouldn't necessarily agree with that.

THE COURT: Okay. Go ahead.

MR. GORDON: Additionally, Your Honor, as you also pointed out, the courts have found that the constitutional provisions in which the people reserve the legislative voice, that's what we're talking about here, are to be liberally construed. The Kuhn vs. Treasury case, the Newsome case, again Ferency, Hamilton, a whole string of cases have over the years developed this theory.

Now, let's look at the provision we're talking about, Your Honor. In 1908, in that Constitution, the court considered a very, very similar provision. The Secretary of

State in relying upon the Attorney General's advice rejected certain petitions because of age. A Complaint was filed mandamus against the Secretary of State to place a ballot proposal on the ballot. The court said, well, you have to examine the constitutional provision to determine what the circulation period is. The court analyzed the provision and found that, since the basis for determining the number of signatures necessary to amend the Constitution was set by the gubernatorial election, and therefore it stands to reason that the circulation period was from one gubernatorial election on the basis as set until four months after the next gubernatorial election or when the ballot proposal can be voted on. That's very clear.

The only difference between then and now is, at that point, the governor was elected every two years, and in 1963 the new Constitution was adopted retaining in much the same language with regard to the basis of signatures for a constitutional amendment. Minor wording changes were made, but the Hamilton case was still in effect. It hasn't been overturned. Therefore, the Hamilton case has really ruled on the issue before you. The basis is the period of time founded by gubernatorial elections.

Another method of constitutional terms, Your

Honor, is to look at the common understanding of the drafters of the Constitution or the people that adopted it. The cases in that regard and argument have been cited throughout our brief. But at the point in time that the comments of the delegates have stated that this process to amend the Constitution is to be retained in much the same way as it currently exists, there was no intent to make major changes. They added a provision allowing the Legislature to legislate with regard to some of the details of petition circulation, but there was no intent evidenced by the drafters at the constitutional convention, either in the convention comments found at the end of each constitutional provision or in the delegates' comments at the actual convention itself, to indicate that they desire to overturn Hamilton, which interpreted the 1908 provision of the Constitution setting the circulation period. Therefore, we would submit that applying that method of constitutional interpretation also supports the position of the Attorney General that the 180-day limitation is unconstitutional.

Finally, let's look at why -- what is the purpose of the 180-day limitation? Is there any valid legislative reason? Mr. Pirich has alluded to the possibility of fraud, perhaps, or duplicate signatures. That's a possibility, I

would submit, in a six-month period. But, at any rate, the Secretary of State does a face check of petitions. The Secretary of State's office does statistical sampling using a computer program and random sampling to determine statistically the validity of signatures. This type of error, I would submit, would be found by the Secretary of State as part of the procedure and analysis they utilize.

Another concern that Mr. Pirich has, he states it's a valid basis for enactment of the limitation, is that someone could sign the petition, for example, at the beginning of the circulation period, say in November after the governor's election, and then two years later, four years later or whenever when the issue comes up on the ballot, the individual may have changed their mind. They may have said, well, the Legislature had acted in part or for a difference in political philosophy, but I would submit, under the six-month limitation, that is still possible. That situation would arise, hypothetically, if a petition were filed six months after the gubernatorial election. Well, it wouldn't be voted on for another year and a half. It wouldn't be voted on until the general election, or, for example, it can be filed the day after one general election to be voted on at the next general election. Therefore, a two-year time lapse would occur. So

the six-month limitation doesn't cure any of those problems, if they are indeed problems. There's no record that there is a problem. We haven't had any affidavits or information that there has been fraud or that there are duplicate signatures or that people have changed their mind. There's simply no record to make a decision upon that basis.

In the interest of brevity, Your Honor, I will simply refer to our brief and reiterate that we believe the fundamental law with regard to constitutional interpretation is clear here, that the provision is self-executing, that the Legislature is prohibited from putting in restrictions on a right placed in a constitutional provision, and that is self-executing, but --

THE COURT: Tell me about the restriction of this right. How is this right restricted?

MR. GORDON: The restriction of the right, Your Honor, is requiring people who were formerly able to circulate petitions for a period of up to four years in order to obtain an adequate number of signatures to now have to compress that into six months.

THE COURT: Is that that bad?

MR. GORDON: I believe so, Your Honor. I have heard Mr. Pirich state here that people have been able to do

that in the past. I am not familiar, but I think by cutting by three-quarters the time period in which an organization is able to circulate petitions is a severe restriction. In fact, as we pointed out in our brief, the convention comments, the delegates were concerned about limiting constitutional amendments or limiting the right of initiative to highly organized special interest groups rather than allowing access to this right by broad-based, loosely organized grass roots type organizations. If the circulation period is limited to six months, I would submit that it would effectively remove the right of the people as a broad-based group to go out and, I guess, casually, without a great deal of organization, without a great deal of money, to circulate petitions and come in with an adequate number.

THE COURT: Well, that's really not -- if you look at the constitutional comments, though, they were talking about making a provision to place on the ballot of constitutional amendment a somewhat difficult process to do. I mean, let's face it, 10 percent of the vote goes to -- who last voted for the governor, 330,000, 333,000, whatever.

MR. GORDON: Three hundred four.

THE COURT: That's a rather major undertaking, isn't it?

MR. GORDON: It is a major undertaking, Your Honor.

THE COURT: And wasn't the design of that to make it somewhat difficult to get matters before the -- otherwise, you'd end up with a California situation.

MR. GORDON: That's right.

THE COURT: And so let me follow the logic. If I follow that logic and we give anybody on the street four years, that would make it much easier to get any, who knows what kind of a proposition onto the ballot, wouldn't it?

MR. GORDON: That --

THE COURT: So that, if I were to follow the constitutional thoughts, the thoughts of the drafters were there has to be a measure and a good clear valid way for the public's initiative to get on the ballot. However, we don't want to make it too easy. We don't want to make it too hard. We have to strike a balance here, and our balance is a certain number tied to the percentage of those who voted for the governor, and the other details we leave to the Secretary of State.

MR. GORDON: No, I don't think so, Your Honor.

THE COURT: Well, tell me, let's be real specific. You show me in Section 2 -- and I read this thing so many times

I think I have it memorized. Full text of the proposed amendment signed by a registered elector at a percentage filed at least 120 days before the election, and the official announcement thereof 60 days prior to the election. The rest of the details left for the Legislature.

MR. GORDON: The details of form, signing and circulation shall be left to the Legislature. I think that language --

THE COURT: Validity and sufficiency --

MR. GORDON: -- speaks to the details, not to the substantive thing.

Your Honor, may I address your one point that wouldn't it be too easy? The answer is no. Since 1963 our history has not shown an inordinate number of ballot proposals being placed on the ballot. Since 1963 no law requiring circulation of petitions with six months or 180 days has been enforced. Our history has been that petitions have been allowed to be circulated over the entire four-year period ever since the last 23 years, ever since the constitutional convention. This law has not been enforced, so there is no danger or there has been no demonstrable danger of having the ballot overburdened with ballot proposals of such a number to confuse the electorate or anything. Our history has demonstrated

that the 10 percent of the vote for governor has been an adequate restriction to limit the ballot proposals to serious, valid proposals.

THE COURT: See, what you're trying to get me to buy is the argument that Frank Kelley has invalidated this law, and, therefore, the subsequent history of the invalidation of the law by Frank Kelley should be borne out experiencially to demonstrate the inactivity in the petitioning process. That's really not the issue, though, is it?

MR. GORDON: No, it isn't, Your Honor. You're correct. The issue is whether this law is constitutional. The issue is whether the 180 days be strict, a right granted to the people by a self-executing provision of the Constitution. I think the issue is whether Hamilton, which addressed almost the identical question, retains its validity. That provision of the Constitution addressing the basis for the signatures has not been substantially changed.

THE COURT: See, the problem -- I like that argument. I like the Hamilton wording. The problem I have with that is that Hamilton was an old Constitution, significantly different provision in the old Constitution. Then we have 1961 Con-Con, and then we have in that Con-Con all these arguments that are made, not specifically directed

to Hamilton, but directed to make this process more difficult to accomplish one way or the other; a recognition that there was an implicit right to petition, but make it more difficult. What we had come out of that was Section 2.

Now, I posit you there are a couple tough issues here. There are many tough issues. The bottom line issues appear to deal with whether or not the Legislature has responded to its authorization to determine the validity and sufficiency of the signatures by the enactment of this particular PA 1973 No. 112, which talks about the 180 days as bearing upon the validity and the invalidity question of the signatures, and whether or not it's an unreasonable burden upon the clear constitutional right of redress. Everything here is a burden one way or the other. The question is whether it's a minor burden or an undue burden.

Go ahead.

MR. GORDON: The point is well taken, Your Honor. However, I would submit that the language in Hamilton discussing the circulation period was substantially retained -- I'm sorry, the Constitution of 1908 language dealt with in Hamilton has not been that much changed in 1963. I would submit the delegates to the constitutional convention, if they had constructive knowledge of Hamilton, had constructive

knowledge or actual knowledge of the petition circulation period up to that point in time, and if they had wanted to change it and if they had let one of the Legislature to change it, they would have substantially changed the language that had been interpreted by the court in Hamilton. That was the only language that addressed the circulation period. But they didn't. They left that the same, and I would submit that the delegates to the constitutional convention, being a somewhat savvy political group of individuals, knew how to change that language. If they wanted to say the Legislature has the authority to limit the circulation period, they could have said this. But they didn't, and they recognized that and they had to recognize --

THE COURT: You're not arguing the 1908 Constitution had the same wording as the 1963?

MR. GORDON: It didn't have the same wording, but it talked about the basis period.

THE COURT: But the basis period was only as it pertained to the collection of signatures, wasn't it?

MR. GORDON: That's right, and that was the period of -- that was the language they used in concluding that the circulation period equaled the basis period, and that type of language in the 1908 Constitution, I don't think, has been all

that drastically changed by the 1963 Constitution. Other provisions, I'll grant you, have been extremely modified, but not that one.

Your Honor, one quote from the constitutional convention which is found on Page 18 of our brief was talking about the maximum number of signatures necessary to initiate a constitutional amendment, and a delegate stated, and I quote, "I cannot imagine anything so vital that I couldn't take one year or two years if it has to be done." He's recognizing at that point the gubernatorial election period under the 1908 Constitution of two years, which was the circulation period for petitions under Hamilton. Nowhere in the Con-Con debates is there any intent set forth, I would submit, to change the circulation period, to grant the Legislature the authority to change the circulation period.

The interpretation of the language here, we believe, talks about the form of petitions and the method of signing and the method of circulation. Can it be circulated on a countywide basis, can it be circulated only on a township or only in a city? Do you have to be a registered voter to sign? Only the details to implement the section are left to the Legislature.

The law, the case law again talking about self-

executing provisions prohibits the Legislature from limiting or restricting rights granted under these self-executing procedures. As you pointed out, there may be certain degrees. Maybe limiting circulations on a countywide basis is a certain restriction. But nobody could argue that it approaches limiting the validity of signatures gathered for six months, as the Legislature has attempted to do in Section 472(a). So we would submit again that the law is clear in the area with regard to how far the Legislature can go in a self-executing provision of the Constitution.

THE COURT: Wait a minute. Let me go back here, though.

MR. GORDON: All right.

THE COURT: Let me go back and make sure we understand. The 1923 Hamilton decision, Page 543 cites at some length Section 2, Article 17. Now, it starts out by talking about the full text of the amendment, 10 percent of the legal voters of the state -- just says 10 percent of the legal voters -- initiative petitions shall be filed with the Secretary of State four months before the election at which the proposed amendment is to be voted on. No problem. That's basically what we have.

Now, here's where it begins a little bit different:

"Upon receipt of such petition by the Secretary of State, he shall canvass the same to ascertain if the petition has been signed by the requisite number of qualified electors, and if the same has been so signed, an appropriate amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected."

So I would submit to you that the prior Constitution talks about a specific type of election. The total number of votes cast for governor at the regular election last preceding the filing of any petition proposing an amendment to the Constitution shall be a basis upon which the number of legal votes necessary to sign the petition shall be computed, and it talks about the petition shall be signed by qualified voters and persons only with a residence address of such persons and the date of signing the same. That's a lot different than in Section 2, because what they talked about is from regular elections of governor to the next regular state election, voters, residents, and such and such. This one doesn't even tell us what kind of election, does it, in the '63 Constitution?

MR. GORDON: I believe the '63 Constitution makes reference to the next general election, which is interpreted

in the Constitution as being biannual elections.

THE COURT: But the 1908 Constitution was much more specific. I guess what I'm saying to you is the Hamilton court didn't do anything novel. They just said, look, the time frame has been set forth in the exacting wording of Article 17, didn't it?

MR. GORDON: But the language they looked at, Your Honor, in doing that is the language that you first mentioned:

> "The petition shall include a full text of the amendment and be signed by not less than 10 percent of the legal voters of the state."

THE COURT: And then it defines who the legal voters are where the 10 percent comes from.

MR. GORDON: That's right.

> "The total number of votes cast for governor at the regular election last preceding the filing of any petition shall be the basis upon which the number of legal voters necessary shall be determined."

That is the language that they used to say that, therefore, the circulation period is a two-year period, the period between gubernatorial elections, that specific sentence,

if you will, or thought out of the 1908 Constitution.

Our point is that specific thought is retained in the 1963 Constitution and, therefore, the reasoning in Hamilton and the decision in Hamilton, unless there has been expressed an intent by the people to change that, should retain its validity, and that, therefore, the circulation period remains to be that period bounded by gubernatorial elections.

THE COURT: Even though it doesn't say that?

MR. GORDON: Even though they maintained the status quo in effect, even though they didn't change Hamilton. You have to impute the intent of the delegates. They had constructive or actual knowledge of Hamilton and of Hamilton's interpretation of that specific language. They retained that specific language in 1963. Therefore, we would submit that Hamilton retains its validity and the circulation period remains to be that period bounded by gubernatorial elections.

THE COURT: What do you do with this 1982 decision that talks about Citizens for Capital Punishment?

MR. GORDON: The 1982 decision, Your Honor, was an attack on, as I recall -- Mr. Hodge can probably help me.

THE COURT: He and you were together on that.

MR. GORDON: We were co-counsel on that case. As I recall, it was an attack on any restriction whatsoever

imposed by statute on a signature or any requirement on the statute. I think that the position of the plaintiffs in that case was if you were a resident of the State of Michigan and over 18, you should basically be able to turn in your signature on the back of a brown paper bag, and our position was and remains the same, Your Honor, that that type of regulation falls within the clear purview of -- granted to the Legislature in Article 12, Section 2, stating any such petition shall be in the form and shall be signed and circulated in such manner as prescribed by law, and that that language clearly allows the Legislature to establish the forms, to establish certain minimum requirements for signatures, including residences and listing of the post office address so that that could be double checked against the voter registration records and matters of that nature. That was all that that decision went to, as I recall. It went only to some of the very, very minor technical aspects of petition circulation.

THE COURT: We might have a minor technical aspect of circulation that we might find unconstitutional, wouldn't we, if we said that a petition would only be valid if the petition itself is six feet long and contains exactly 200 signatures with the full first name, middle name, last name?

MR. GORDON: That would be an undue restriction.

THE COURT: That would be ridiculous, wouldn't it?

MR. GORDON: Certainly, Your Honor.

THE COURT: So we have to impute within that some semblance for the fact that the clerical matters of implementation may not themselves impose an undue burden on the circulation?

MR. GORDON: That's correct, Your Honor.

THE COURT: Continue.

MR. GORDON: Your Honor, I believe I've summarized my argument. Again, at the risk of repetition, the provision is self-executing. The Legislature is prohibited from putting undue restrictions on a self-executing constitutional provision, particularly those provisions that grant a legislative voice to the people, and that this law is just that. It's unconstitutional, it's an excess restriction on the right of the people to access the ballot for purposes of constitutional amendments, and, therefore, the opinion of the Attorney General ought to be upheld. Thank you.

THE COURT: Thank you. Thank you.

Do you wish to respond, Mr. Pirich?

MR. PIRICH: Very briefly, Your Honor.

I think I can address two issues that the Court

brought up in terms of colloquy with Mr. Gordon.

I think no one disputes what Hamilton says, and I think the Court's reading of Hamilton verifies what we have been arguing throughout, that Hamilton had a road map contained in it that could direct anyone where they had to go under this procedure. But Hamilton did not involve a statutory enactment called for by the framers of the Constitution. That's the big difference, and everyone in terms of the courts that have examined this concept of self-execution, I think, doesn't address that particular issue.

What did the Supreme Court say when it looked at Hamilton? It said it summons no legislative aid. Article 12, Section 2, not only summons it, it says it's authorized and required. The Supreme Court in Hamilton said it grants rights on conditions expressed. Its provisions are prospective in operation and self-executing. The vote for governor every two years fixes the basis for determining the number of legal voters necessary to sign an initiative petition. It's all there, but that's not what Article 12, Section 2, does. It isn't all there, and Mr. Gordon has switched his position.

First, in answer to the Court, he said, yep, you can't even restrict a petitioner who comes in with a petition on the back of a brown paper bag. But then when he gets back

up to the Citizens decision of 1982, he says, well, even though they may be required to do that, certain restrictions, those that aren't burdensome and don't impose or in any way inflict upon their constitutional rights, well, those would be okay. It's self-executing in concept, but it seeks and calls for legislative aid, which is a much different proposition than Hamilton did.

Lastly, Your Honor, because I think the Court has questioned all of the issues that are pertinent in this matter, you referred to the Ferency decision and you referred to, on Page 593, to their interpretation, and I think it's important on Page 593 just before Footnote 2, it says:

> "Further, where, as here, there is doubt as to the meaning of legislation regulating the reserved right of initiative, that doubt is to be resolved in favor of the people's exercise of the right,"

and there is a footnote, and the footnote is State vs. Campbell.

We in our brief referred to both State vs. Campbell and a corollary decision that was also rendered in regard to that particular provision in State vs. Snell.

The Campbell decision was 1973 and the State vs. Snell decision was a 1942 decision. What did they say? Legislation which tends to insure a fair, intelligent, and

impartial accomplishment may be said to aid or facilitate the purpose intended by the Constitution. Well, that's what we're talking about here. The Legislature has been given that authority in the Constitution. Article 12, Section 2, imposes certain burdens upon the elective directly, but it called for the Legislature to impose those requirements and restrictions which are obviously necessary in a matter of this nature.

I think the Court hit upon the important point in this matter, namely, that in 1974 when this opinion was issued, the roles got switched here. We don't have the burden. In fact the burden has been reversed in the sense that the Constitution and -- strike that -- the statute is presumed to be constitutional. No empirical evidence was ever developed by the Attorney General when he issued the opinion that in any way any of the restrictions that are referred to Section 472(a), whether they be time, staleness or voidness, have ever been implemented or ever affected any circulator or signator of the petition. It was he who made the quantum leap and it is he who issued that decision, but that decision is not binding on this Court in the sense that there is no evidence or record and the Court has to engage in that presumption of constitutionality.

I think, Your Honor, all of the case law that we

have cited shows, and I think Mr. Gordon's colloquy with the Court clearly shows, that this is not a provision which is implemented by itself without aid or assistance from the Legislature, because, if that in fact is the case, Your Honor, then we can take these petitions which people circulate in which they go to the Board of Canvassers and seek approval for and tear them up because they're not needed, and I think that's the important point. A Legislature has the duty and obligation to uphold the purity of the electoral process, and we believe and contend that's what Section 472(a) did. It put a board which was called for and authorized by the Legislature in terms of exactly what Article 12, Section 2, says -- validity, sufficiency, circulation, the nuts and bolts of getting these petition signatures either affixed to and submitted to the Secretary of State for review.

Your Honor, thank you very much.

(Whereupon, oral argument concluded.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS:
COUNTY OF INGHAM)

I, Kevin W. Gaugier, Official Court Reporter within and for the County of Ingham, State of Michigan, do hereby certify that I reported the proceedings had in the case of Consumers Power Company, et al, versus Frank J. Kelley, et al, before the Honorable Robert Holmes Bell, Circuit Judge in and for the 30th Judicial Circuit of Michigan, at Mason, Michigan, on July 18, 1986, and that the foregoing typewritten record constitutes a true and correct record of the proceedings had.

Dated: August 19, 1986.

Kevin W. Gaugier, CSR-3065
Official Court Reporter

STATE OF MICHIGAN

IN THE 30th CIRCUIT COURT FOR INGHAM COUNTY

CONSUMERS POWER COMPANY,
a Michigan corporation,
and THE DETROIT EDISON COMPANY,
a Michigan corporation,

Plaintiffs,

v

FRANK J. KELLEY, ATTORNEY GENERAL, RICHARD H. AUSTIN, SECRETARY OF STATE, and BOARD OF STATE CANVASSERS,

Defendants.
_____/

No. 86-56487-CZ

Hon. Robert Holmes Bell

FILED—30th CIRCUIT COURT
JUL 18 1986
BY: MARY M. BRAKAR
Deputy Clerk

DECLARATORY JUDGMENT

At a session of said Court held in the City of Mason, County of Ingham, this 18 day of July, 1986.

PRESENT: HONORABLE ROBERT HOLMES BELL

THIS CIVIL ACTION having been brought before the Court by Plaintiffs' Motion for Summary Disposition and Defendants' motion to dismiss the action; the parties and amici curiae having submitted briefs thereon; the parties having presented oral argument thereon; and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED, that section 472a of the Michigan Election Law, 1954 PA 116, added by 1973 PA 24, § 1, as amended by 1973 PA 112, § 1; MCLA 168.472a; MSA 6.1472(1), does not violate Const 1963, art 12, § 2, and is constitutional as applied to petitions to propose a constitutional amendment for the reasons set forth in this Court's oral opinion.

Robert Holmes Bell
30th Circuit Court Judge

KDMD1/089

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BD